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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-121

PRO-FOOTBALL, INC., NATIONAL FOOTBALL LEAGUE, DISTRICT OF COLUMBIA ARMORY BOARD, ET AL.,
Petitioners,

v.

NORMAN F. HECHT, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

NORMAN F. HECHT, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in its case No. 24,446, entitled *Hecht et al.* v. *Pro-Football, Inc., et al.*

OPINIONS BELOW

The opinion of the District Court is reported at 312 F. Supp. 472 and is reproduced as Appendix A to this Petition (pp. 1a-10a, *infra*). The opinion of the Court of Appeals is not yet reported; it is reproduced as Appendix B to this Petition (pp. 11a-43a, *infra*).

JURISDICTION

The judgment of the Court of Appeals (Appendix C, p. 44a, *infra*) was entered on April 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a violation of the Sherman Act can be predicated on the execution and performance of a contract between a government agency and a private party, negotiated at arm's length without fraud, misrepresentation or overreaching on either side, with respect to the use of a public facility the control and management of which Congress has entrusted by statute to the government agency "without regard to any other provision of law."

STATUTES INVOLVED

Sections 1, 2 and 3 of the Sherman Act and pertinent provisions of the District of Columbia Stadium Act are set forth in Appendix D to this Petition (pp. 45a-48a, *infra*).

STATEMENT

In 1957 Congress authorized the Armory Board, a government agency,[1] "to construct, maintain, and operate a stadium" so as "to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility . . . ." District of Columbia Stadium Act § 2, 71 Stat. 619, 2 D.C. Code

[1] The Armory Board was established by Congress in 1948. 62 Stat. 339, 2 D.C. Code § 1702.

§ 1720. The enabling statute was amended in 1958 and 1959 and in its final form authorized construction of the stadium on land to be acquired by the Department of the Interior, by condemnation if need be, with construction to be financed by bonds issued by the Armory Board. *Id.* §§ 2, 3, 4, 2 D.C. Code §§ 1720, 1721, 1722. The Department of the Interior was directed to enter into a contract with the Armory Board for the construction, maintenance and operation of the stadium. *Id.* § 3, 2 D.C. Code § 1721. The Board was given the broadest of discretion in carrying out its functions under the statute:

> "In order to carry out the purposes of this subchapter, the Board is authorized without regard to any other provision of law, but subject to any contract entered into with the Secretary of the Interior under section 2-1721—
>
> "(1) to determine all questions concerning the use of the stadium for the purposes of this subchapter;
>
> ". . . .
>
> "(8) to rent or lease from time to time for any of the purposes of this subchapter, all or any part or parts of the stadium including any or all structures, equipment or facilities of the stadium, at such rental values and for such periods of time as the Board shall determine . . ." *Id.* § 5, 2 D.C. Code § 1723.

Throughout the period in which the stadium legislation was being considered it was accepted that the success of the stadium venture depended on making appropriate long-term arrangements for the use of the stadium by Washington's two major league profes-

sional athletic teams, the Washington Senators and the Washington Redskins.[2]

Construction of the stadium, first known simply as D.C. Stadium and since 1968 as Robert F. Kennedy Memorial Stadium, began in 1959, and the stadium was opened in 1961.

On December 24, 1959, the Armory Board and the Redskins, after what the Court of Appeals described as "arm's-length, hard bargaining between the two parties for approximately a year and a half" (p. 14a, *infra*), entered into an agreement under which the Redskins committed themselves to rent the stadium for their home games beginning with the 1961 season and continuing for 30 years. The Board, in turn, agreed not to rent the stadium to another professional football team during the term of the lease.

The respondents are individuals who claim to have been promoters seeking a professional football franchise for Washington in a league other than the Redskins' league, the National Football League. They claim to have been thwarted by their inability to obtain from the Armory Board permission to use D.C. Stadium (as it then was) because of the exclusivity provision of the Board's lease agreement with the Redskins. The respondents brought a suit under Sections

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[2] 104 Cong Rec. 13787 (1958); 103 Cong. Rec. 6826 (1957); see pp. 8a-9a & n.9, *infra*. As amended in 1958, the Stadium Act directs that the stadium be "constructed substantially in accordance with the plans for such stadium contained in the Praeger-Kavanagh-Waterbury survey entitled 'Engineering and Economic Study, District of Columbia Stadium' dated March 31, 1958." § 2, 2 D.C. Code § 1720. The study referred to was based on the expectation that the Senators and the Redskins would be the chief sources of revenue. Pp. 3, 57, 80-85.

4 and 16 of the Clayton Act, asking treble damages for and injunctive relief against alleged violations of Sections 1, 2 and 3 of the Sherman Act. The defendants who remain in the case, the petitioners here, are Pro-Football, Inc., the corporate name of the Redskins, the National Football League and the Armory Board and its members. They are accused of contracting and combining in restraint of the business of professional football and of monopolizing and attempting to monopolize that business.

The factual allegations on which the foregoing Sherman Act charges are based relate solely to the inclusion of the exclusivity provision in the agreement between the Armory Board and the Redskins and the enforcement of the provision to deny respondents the use of the stadium.[3] "There is no contention," the Court of Appeals said, "that there was any fraud, misrepresentation, or overreaching on either side." (P. 14a, *infra.*)

The District Court granted the petitioners' motion for summary judgment. It reasoned that "no violation of the [Sherman] Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action." (P. 10a, *infra.*) The Court of Appeals reversed, holding that, even though the Armory Board-Redskins lease represented action of a governmental entity, its terms were subject to scrutiny under the antitrust laws

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[3] There is no factual allegation independent of the contract on which liability on the part of the National Football League is sought to be predicated. There were at one time additional counts relating to the merger of the NFL and the American Football League, but those were dismissed by consent.

and could be the basis for finding an antitrust violation. The court said that the lease "must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties." (P. 43a, *infra*).

REASONS FOR GRANTING THE WRIT

The decision below is on an important question of antitrust law in an area in which there is a wave of current litigation that is significant both for the development of antitrust doctrine and for its potential unsettling effect on the way governments and private businesses conduct their affairs. The respondents themselves told the Court of Appeals that "the issue raised by this appeal," which is the issue presented by this Petition, "is of great public importance because of the effect the decision will have on a large part of the economy." (Reply Brief, p. 1). The decision of the Court of Appeals was that the government lease involved in this case must be subjected to the same antitrust scrutiny as a wholly private contract. If given general effect, that decision would bear heavily upon the numerous units of government and agencies within those units that perform their public functions in whole or in part through contracting with private firms. Heretofore it has been understood that public contracts are not judged by the standards of the antitrust laws—that the antitrust laws are simply inapplicable to them. Two courts of appeals have so held. The decision below, which stands alone, is in conflict with the decisions of those courts as well as with the general understanding.

More broadly, the decision below is inconsistent with decisions of this Court that have delimited the role of

the antitrust laws in relation to valid governmental action and to private action associated in some way with governmental action. Some confusion, evidenced by this case and others, has lately marked decisions of the courts of appeals applying the rule of those cases. This Court has recognized the need for clarification by granting review of a decision of the Court of Appeals for the Ninth Circuit that, like the decision below, would constrict the area surrounding governmental action in which the antitrust laws are inapplicable. This case is appropriate to be heard with that one, *California Motor Transport Co.* v. *Trucking Unlimited,* now pending on writ of certiorari, No. 70-92, O.T. 1971.

I.

The conflict is square between the decision below and the decision of the Court of Appeals for the First Circuit in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966), as well as the decision of the Ninth Circuit in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969).[4] The nature of the conflict and importance of the issue to which it relates can best be understood by consideration of the following background:

The public contract is an increasingly important instrument of government. It is used on all levels of government, federal, state and local, and by all kinds of governmental agencies and departments.[5] It is used

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[4] In accord with the courts of appeals' decisions is Heath v. Aspen Skiing Corp., 1971 Trade Cas. ¶ 73,560 at 90,345 (D. Colo. 1971).

[5] In 1967, there were more than 81,000 local governments in the United States. U.S. Bureau of Census, 1967 Census of Governments, vol. V, at 1-2 (1967).

to acquire multi-billion dollar weapon systems [6] and to operate public housing projects; [7] to grant federal subsidies to shipping companies [8] and to provide college and university facilities; [9] to develop atomic power [10] and to purchase clothing.[11]

In many instances public contracts would raise serious questions under the antitrust laws if those laws were considered applicable to them. Governments often seek and obtain price concessions not available to other purchasers of goods or services.[12] Governments sometimes enter into price-fixing agreements [13]

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[6] In fiscal 1970, military prime contracts awarded by the Department of Defense after receipt of two or more responsive offers for competitive price, design or technical proposals totaled $14,696,000,000. In the same fiscal year, the Department entered into 177,688 procurement actions (awards of or changes in prime contracts) of $10,000 and over. Office of the Secretary of Defense, Military Prime Contract Awards, July 1969-June 1970, at 34, 50 (1970).

[7] Better Home Heat Council, Inc. v. Housing Authority of Hartford, 148 Conn. 536, 172 A.2d 610 (1961).

[8] Moore-McCormack Lines v. United States, 413 F.2d 568 (Ct. Cl. 1969).

[9] Tilton v. Richardson, 39 U.S.L.W. 4857 (U.S. June 28, 1971).

[10] Owens-Corning Fiberglas Corp. v. United States, 419 F.2d 439 (Ct. Cl. 1969).

[11] L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969).

[12] The Robinson-Patman Act has been said not to be applicable to contracts of the federal government. 38 Ops. Att'y Gen. 539 (1936).

[13] Ventura Port Dist. v. Taxpayers, 53 Cal. 2d 227, 233-25, 347 P.2d 305, 310-11 (1959); compare Rough Diamond Co. v. United States, 351 F.2d 636 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 957 (1966).

and requirements contracts.[14] Governments quite often contract, as the Armory Board did here, to give a private entity exclusive rights to use government property commercially.[15] And they bar private parties from contracting or otherwise dealing with government agencies.[16]

In none of these instances or others that may be supposed has it been thought that contracts of government agencies are to be judged by the standards of the antitrust laws as applied to dealings between private parties. The rule as to government contracts is an aspect of the general rule that the antitrust laws are not applicable to valid governmental acts. *Parker* v. *Brown,* 317 U.S. 341 (1943).[17] (See pp. 16-17, *infra*). This is not to say that statutes governing the contracting authority of particular government agencies may not contain provisions such as direc-

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[14] Compare Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65 (1902), with Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[15] Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Panama City v. Seven Seas Restaurant, Inc., 180 So.2d 190 (Fla. App. 1965); Hertz Driv-Ur-Self System, Inc. v. Tucson Airport Authority, 81 Ariz. 80, 299 P.2d 1071 (1956).

[16] Compare Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), with Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

[17] In Parker v. Brown, 317 U.S. 341, 351-52 (1943), the Court, in making the point that it was dealing with sovereign, state, governmental action (see pp. 16-17, *infra*), said that "the state . . . made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly. . . ." This language has not been taken, even by the court below, which quoted it, as an indication that every public contract is properly to be scrutinized to determine whether it imposes an illegal restraint or otherwise violates the antitrust laws. At the very most it leaves open the question posed by this case, which should now be answered.

tions to engage in competitive bidding.[18] But the existence in government contract statutes of particular provisions dealing with competition does not qualify the general rule that the antitrust laws are inapplicable to public contracts. When the legality of a public contract is brought in question, the issue is whether in its terms and in the procedures followed in nego-

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[18] The D.C. Stadium Act is an example. The Court of Appeals noted that one of the provisions of the Act, the provision authorizing the Armory Board to acquire and dispose of equipment and other property, requires competitive bidding on contracts of more than $3,000. § 5, 2 D.C. Code § 1723. (Pp. 38a-39a, *infra*.)

This is the same section of the statute that authorizes the Armory Board to act in respect of the stadium "without regard to any other provision of law." If the issue in the case is regarded as a question of construction of the Stadium Act rather than the Sherman Act, the specific subjection of larger property acquisition contracts to a competitive bidding requirement is significant as a demonstration that Congress understood that "without regard to any other provision of law" meant that usual restrictions on government procurement were inapplicable. On the face of things, there is no reason to suppose that it would have a different understanding as to the applicability of the antitrust laws.

But the Court of Appeals reasoned to an opposite, illogical conclusion. It found in the specific competitive bidding requirement a general Congressional attitude favoring competition on larger contracts that, the court said, made it difficult to comprehend why Congress, having this attitude, should have been "anti-free competition" in regard to "the largest and most important contracts—for long-term rental . . . ." (P. 39a, *infra*.) The difficulty is of the Court's own making, brought about by inferring far too general a policy from the very specific competitive bidding provision. Not only is the Court of Appeals' reasoning dubious but its premise is unsound. Congress manifested no such pro-competition attitude with respect to large contracts as the Court of Appeals attributed to it. The Armory Board's largest single contract would presumably be the contract for construction of the stadium, and another section of the Act specifically authorized the Board to "provide for the construction of . . . [the] stadium by such means as it determines will most effectively carry out this Act (including, but not limited to, a negotiated contract)." § 2, 2 D.C. Code § 1720.

tiating or awarding it the contract comports with the contracting agency's statutory authority—not whether if it were a contract merely between private parties any of its provisions would be held repugnant to the antitrust laws.[19]

Municipal stadiums are among the public facilities that are the subjects of contracts with private parties for their use. See *Martin* v. *Philadelphia,* 420 Pa. 14, 18, 215 A.2d 894, 896 (1966). The operation of municipal stadiums is a public or governmental function and not a proprietary function—if that outmoded distinction is indulged. *Ibid.*[20] Many professional football teams play their home games in municipally owned stadiums.

Congress determined that the District of Columbia should have a municipal stadium. It authorized the Armory Board, a government agency, to construct, operate and maintain a municipal stadium and empowered it, "without regard to any other provision of law," to determine all questions concerning the use of the stadium and to rent or lease the stadium for such periods of time as it might determine. Pursuant to this authority the Board (1) decided that the stadium should be used during football season by

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[19] Acts that tend to defeat the very purpose of competitive bidding may incur antitrust liability. There is of course no antitrust immunity for collusive bidders on government contracts. And acting through public employees to rig specifications to favor one bidder over another has been held an antitrust violation. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970).

[20] In New York v. United States, 326 U.S. 572, 583 (1946), the opinion announcing the judgment of the Court spoke of "such untenable criteria as 'proprietary' against 'governmental' activities of the States." A majority of the Court agreed with this view. See *id.* at 586, 591.

the Washington Redskins for their home games (and for college and high-school games as well)[21] and (2) entered into a lease agreement with the Redskins which provided that at no time during the 30-year "term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins."

The Court of Appeals held that the exclusivity provision of the contract may be the predicate for finding that the Armory Board, the Redskins and the NFL have violated the antitrust laws. The potential of antitrust liability arises, the court said, because Congress did not say "including the antitrust laws" when it empowered the Armory Board to deal with the stadium "without regard to any other provision of law" or state in the antitrust laws themselves that they do not apply to contracts of the Armory Board. The decision is unprecedented. No court has ever previously held that any such specific Congressional exemption is necessary to avoid antitrust coverage of public contracts. To the contrary, the general understanding has been that it would take specific Congressional action to subject public contracts to the antitrust laws.[22]

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[21] There is no restriction on college and high-school football games except that they may not be scheduled the day before Redskins' home games without the Redskins' consent; consent has been freely given.

[22] On the Court of Appeals' standards, many Department of Defense and NASA contracts could well be subject to the antitrust laws. The Armed Services Procurement Act, granting these agencies their contracting authority, specifies the laws that are inapplicable to agency contracts without including the antitrust laws, 10 U.S.C. § 2314, and competitive principles were intended to control the great bulk of contracting under the Act. S. Rep. No. 571, 80th Cong., 1st Sess. 1-6, 12-13, 15-16 (1947); H. R. Rep. No. 109, 80th Cong., 1st Sess. 3-6 (1947).

As indicated above, two courts of appeals have made this general understanding explicit. They held that the antitrust laws do not cover public contracts in cases involving contracts challenged, like the Armory Board-Redskins lease, because of exclusivity provisions. The decision below is squarely in conflict with those decisions, which so far as we are aware were the only reported decisions on the precise issue until the court below decided this case.

In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966), the Port Authority contracted with a private company for the latter to supplant two other companies and become the sole fixed-base operator at Logan Airport in Boston, providing fuel and maintenance service and the like to those using the airport. An antitrust suit was brought by one of the former fixed-base operators, naming the Port Authority and the new operator. The court held that no suit lay. In terms that could be applied to the Armory Board and its lease agreement with the Redskins, the court said:

> "By statute [the Authority] has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. It also has wide powers, many of which are bestowed only upon instrumentalities of government.
>
> * * *
>
> "In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with [the chosen fixed base operator]. It is clear that in doing so

> it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use . . . . What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action." 362 F.2d at 55.

As for the defendants other than the Port Authority, the court noted that their only conduct alleged to be in violation of the antitrust laws was their dealings with the Port Authority. (Similarly, the only violative conduct alleged in this case is the transaction between the Armory Board and the Redskins.) The court held that in the circumstances "it would be an unreasonable restriction on . . . [the Authority's] freedom to hold that the other defendants acted illegally in having aided it." *Id.* at 56.

The second case is *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). One of two companies was awarded by a Nevada county commission an exclusive contract to pick up and dispose of the county's garbage. The company that did not receive the contract complained under the antitrust laws. The Court of Appeals affirmed summary judgment for the defendant on the ground, *inter alia,* that the antitrust laws were inapplicable to the exclusive agreement, the execution of which by the county commission had been authorized by the Nevada legislature.

Those two cases, and particularly the *Wiggins* case, are indistinguishable on any tenable legal ground from this one. The court below attempted to distinguish the *Wiggins* case on the ground that the Port Authority itself might have provided airport services whereas

the Armory Board could not be expected to own and manage the Redskins. The significance of the distinction is difficult either to comprehend or to accept. There is very little today that governmental bodies cannot directly do—run school systems, provide school lunches, operate factories, lease warehouses, manage municipal auditoriums or provide public entertainment. In any event, the distinction is beside the point. The Armory Board's contract with the Redskins was plainly pursuant to its statutory authority to operate the stadium. It was a governmental act based upon the Board's determination of a question concerning the use of the stadium, a determination that Congress made the sole responsibility of the Board. No more and no less was the decision of the Massachusetts Port Authority to contract for airport services an exercise of its power under its governing statute.

The rationale of the *Wiggins* case is that "the antitrust laws are aimed at *private* action, not at governmental action." See *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 491-94 & n.15 (1940). That rationale is fully applicable here.

The decision below is in irreconcilable conflict with the First Circuit's *Wiggins* decision (and with the Ninth Circuit's decision in the *Sun Valley Disposal* case as well). This Court should resolve the conflict. The question of the applicability of the antitrust laws to public contracts is of the utmost importance to governments and to those who do business with governments. It is a question that is bound to recur, now that it has been opened by the court below, unless this Court settles it at once.

II.

Relief cannot be had under the antitrust laws for injuries suffered as a result of valid governmental action; the inapplicability of the antitrust laws to public contracts is an aspect of that broad doctrine.[23]

The foundation cases are *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939), dealing with a federal program, and *Parker* v. *Brown*, 317 U.S. 341 (1943), dealing with a state program, in each of which it was held that a governmental program substituting for customary modes of competition a regime of cooperation among natural competitors could not be attacked for violation of the Sherman Act.

The doctrine of those cases remains unimpaired by any subsequent decision.[24] Certainly it remains true today that "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a

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[23] Examples of the application of this doctrine by the lower federal courts are Ladue Local Lines, Inc. v. Bi-State Developmental Agency, 433 F.2d 131 (8th Cir. 1970); Alabama Power Co. v. Alabama Electric Co-op., 394 F.2d 672 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968).

[24] Continental Ore Co. v. Union Carbon Corp., 370 U.S. 690 (1962), casts no doubt upon the doctrine. There a private interested party was delegated power to act for the government of Canada and, by acting in restraint of the trade in which it was interested, abused the power in a manner not contemplated by any true government official. This Court held that the acts of the private agent could be considered in determining whether there was a conspiracy in violation of the Sherman Act. The behavior described in the *Continental Ore* opinion is a far cry from the usual governmental action case, including this case, in which there is no doubt that true government officials acted and—in this case at any rate—acted in accordance with the statute empowering them to act.

state." *Parker* v. *Brown, supra,* at 351. It is a matter not of exemption or immunity from the antitrust laws but of the limits of the coverage of those laws.[25] "[W]e do not reach any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place." *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52, 56 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966).[26]

In *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 135-36 (1961), the court found it necessary to inquire into whether there was liability under the antitrust laws for private conduct that was intended to bring about governmental action by which injury was inflicted upon competitors. The Court held that private conduct to induce governmental action, even though joint and aimed at competitors and thus suspect under Section 1 of the Sherman Act, is also not actionable under the antitrust laws. That was a case in which railroads had engaged in efforts to

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[25] For this reason the court below is wide of the mark in its discussion of the cases in which this Court and the lower federal courts have considered whether particular private conduct is immunized from the antitrust laws by a federal regulatory statute or the action of a federal regulatory agency. (Pp. 32a-37a, *infra*). The issues in those cases relate to the presence or absence of express authority in the agency to confer antitrust immunity, the extent to which the agency is bound to consider the policies of the antitrust laws in making its decisions and the ability of the Department of Justice or private parties to attack private conduct said to be sanctioned by an agency order or a regulatory statute.

[26] The penalties of §§ 1, 2 and 3 of the Sherman Act are imposed on "every person" who violates their terms. Person as used elsewhere in the Act does not include the United States. United States v. Cooper Corp., 312 U.S. 600, 607 (1941); as to states, see Parker v. Brown, 317 U.S. 341, 351 (1943); Georgia v. Evans, 316 U.S. 159 (1942).

secure passage and enforcement of laws that would injure truckers. Later the same rule was applied in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), where there was an allegation of a conspiracy among mine owners and a union to induce the Secretary of Labor to establish certain standards that would prejudice smaller mine owners. The Court reiterated there that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670.

Some recent decisions of the lower federal courts have sought to limit the doctrine of the *Noerr* and *Pennington* cases. See *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *petition for cert. filed* May 15, 1971 (No. 70-173, O.T. 1971); *Trucking Unlimited* v. *California Motor Transport Co.,* 432 F.2d 755 (9th Cir. 1970). This Court has accepted for review one of the cases in which a court of appeals has found potential antitrust liability in a campaign to induce governmental action. *California Motor Transport Co.* v. *Trucking Unlimited, cert. granted* June 1, 1970 (No. 70-92, O.T. 1971). There some trucking firms combined to oppose others' efforts to obtain from the Interstate Commerce Commission and the California Public Utilities Commission licenses to operate as truckers or enlargement of existing trucking licenses; the Ninth Circuit decided that the antitrust laws were applicable to the trucking firms' joint efforts.

If *Trucking Unlimited* is deserving of the Court's consideration, this case is even more so; it presents a

more basic question than *Trucking Unlimited.*[27] The fundamental lesson of *Parker* v. *Brown* and *United States* v. *Rock Royal Co-op.* is that the antitrust laws are inapplicable to valid governmental acts. The *Noerr-Pennington* doctrine is an offshoot of that principle, whose limits have constantly been in dispute.[28] The *Trucking Unlimited* case merely suggests new, narrower limits for the *Noerr-Pennington* doctrine. In this case, on the other hand, the very principle of inapplicability of the antitrust laws to governmental acts is brought into question.[29] Any review of issues relating to the status under the antitrust laws of governmental acts and related private conduct should include the issues raised by this case.

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[27] In addition, it should be noted that the court below relied upon *Trucking Unlimited* and, even more, on Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), which is pending in this Court on a petition for certiorari, No. 70-173. (Pp. 23a-25a, 31a-32a, *infra*).

[28] Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 Mich. L. Rev. 333 (1967); Walden, *More About Noerr —Lobbying, Antitrust and the Right to Petition,* 14 U.C.L.A. L. Rev. 1211 (1967); Comment, *Whitten* v. *Paddock: The Sherman Act and the "Government Action" Immunity Reconsidered,* 71 Colum. L. Rev. 140 (1971); Note, *Application of the Sherman Act to Attempts to Influence Government Action,* 81 Harv. L. Rev. 847 (1968).

[29] In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), holding the antitrust laws applicable to the rigging of specifications for competitive bidding, the Court distinguished its earlier *Wiggins* decision involving the terms of a validly awarded public contract as lying "at the *Parker* [v. *Brown*] end of the spectrum" of governmental acts. *Id.* at 30.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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